LIM CHENG HAI & ANOR

v.

ZKP DEVELOPMENT SDN BHD

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 12-84-2002]
29 MAY 2002

CIVIL PROCEDURE: *Preliminary objection - Procedural and technical objection - Whether there was failure to comply with O. 49 r. 6(3) of the Subordinate Courts Rules 1980 - Whether court should exercise discretion to cure defect in order to prevent injustice - Subordinate Courts Rules 1980, O. 49 r. 6(3)*

CIVIL PROCEDURE: *Jurisdiction - Inherent jurisdiction of court - Failure to comply with rules of practice - Whether court should exercise discretion to cure defect in order to prevent injustice - Subordinate Courts Rules 1980, O. 49 r. 6(3)*

This was the appellants' appeal against the decision of the learned sessions court judge allowing the respondent's application under O. 14 r. 21(b), (c) or (d) of the Subordinate Courts Rules 1980 ('SCR') to strike out the appellants' defence and counterclaim. The respondent raised a preliminary objection to the appeal, contending that the appellants had failed to comply with O. 49 r. 6(3) of the SCR. The appellants, however, relied on the latest decision of the Federal Court in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputera Malaysia Bhd* which held that the court has the inherent jurisdiction under the common law to deal with cases with a view to prevent injustice in limited circumstances.

Held:

[1] The meaning that ought to be given to the words "draft order" in O. 49 r. 6(3) of the SCR is the draft order that has been approved both by the respondent's solicitors and by the registrar. The appellants fell far short of the requirements of O. 49 r. 6(3)(d) of the SCR as the draft order in this case was not only not approved and unsigned by the respondent, it was not even approved by the registry. (pp 318 f-g & 319 a)

[2] If there was any injustice at all, the appellants brought it upon themselves for failing to comply with the rules of practice, and even to the very end, the appellants never applied for an extension of time nor asked for leave. The defect of the appellants could not be cured by applying *Megat*

Najmuddin (supra) because when the appellants had a way to fall back to and failed or refused to take advantage of that step that would have helped to cure the defect, they could not seek the aid of the court again by claiming that an injustice had been done to them. (p 319 f-g)

[Appeal dismissed.]

Case(s) referred to:
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 ***(dist)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 14 r. 21(b), (c), (d), O. 49 r. 6(3)(d)

For the appellants/defendants - EK Chia; M/s Anoop & See
For the respondent/plaintiff - Amsavani; M/s Chew Ju Li & Co

Reported by Suresh Nathan

JUDGMENT

RK Nathan J:

Facts
The respondent/plaintiff sued the appellants/defendants in the Sessions Court at Butterworth for payment of various damages with interest arising out of a sale and purchase agreement entered into between the plaintiff as vendor and defendants as purchasers of a unit priced at RM325,028. For the purpose of considering this appeal there is no need for this court to descend into any further particulars. After a defence and counterclaim had been filed the plaintiff took out an application under O. 14 r. 21(b), (c), or (d) of the Subordinate Courts Rules 1980 (the SCR) to strike out the defence and counterclaim with costs. On 28 February 2002 the Sessions Court, having heard the application and having read the affidavits in support and after due submissions, allowed the plaintiff's application and struck out the defence and counterclaim with costs. On 4 March 2002 the defendants filed and served their notice of appeal.

Finding Of The Court
On the day fixed for the hearing of the appeal, counsel for the respondent raised a preliminary objection to the appeal, having confirmed that due notice had been given to the appellant's solicitors.

Cik Amsavani pointed out that the appellants had failed to comply with O. 49 r. 6(3) of the SCR. It is necessary to reproduce the relevant provisions of O. 49 r. 6 of the SCR to appreciate this argument. They read as follows:

(1) Notwithstanding anything contained in this Order, an appeal from any decision other than a decision made after trial by the Court shall lie to a Judge in Chambers of the High Court.

(2) The appeal shall be brought by filing a notice of appeal in Form 140 in the registry of the relevant subordinate court, with a copy extended to the registry of the High Court, within 14 days from the date on which the decision was pronounced and serving a copy of the notice on every other party to the proceedings.

(3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court, and the record shall contain copies of:

(a) the application for the decision;

(b) all pleadings filed;

(c) all affidavits filed in support of or in opposition to the application; and

(d) the order or draft order of the decision appealed from:

Provided that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

(4) ...

(5) ...

It would seem therefore that the appellants ought to have filed the Record of Appeal on or before 25 March 2002. Indeed the said Record of Appeal was filed on 22 March 2002, well within time. With regard to the draft order that ought to be included in the Record of Appeal the appellants only included a draft order only signed by the appellant's solicitors. The draft was not only not approved and signed by the respondent's solicitors, it was not even approved by the registry.

To my mind, the meaning that ought to be given to the words "draft order" in O. 49 r. 6(3)(d) of the SCR is the draft order that has been approved both by the respondent's solicitors and by the registrar, because what is important is the registrar's approval, since the registrar will only approve the draft order after perusing the minutes of the judge's record on the Court file endorsed by the interpreters or if in doubt, after perusing the judge's own record book wherein the judge had recorded the proceedings. The SCR provides for such a draft to be included because sometimes the fair order might not be extracted within the three weeks provided, due to various exigencies and constraints. With shortage of manpower at the registry and with hundreds of orders to be

approved, the staff manning the various registries are hard put to cope with issuing out fair orders in time. Hence the SCR allows for the approved draft to be included. In this case the appellants fell far sort of the requirements of O. 49 r. 6(3)(d) of the SCR.

The appellants however filed on 10 April 2002 a Rekod Rayuan in which was included a copy of the fair order of the court. Firstly this subsequent Record of Appeal is headed "Rekod Rayuan". There is also a Rekod Rayuan filed earlier. Can this subsequent record also be entitled Rekod Rayuan? The normal practice is that it be entitled 'Rekod Rayuan Tambahan.'

In any case the appellants did not apply for leave for extension of time to file the Rekod Rayuan Tambahan. In fact even at the appeal stage I would have considered such an application after, of course, hearing from the respondent, if it had any objection. Even at that stage the appellants did not apply orally for leave to justify their conduct in filing the Rekod Rayuan Tambahan without leave.

The appellants relied on the latest decision of the Federal Court in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Berhad* [2002] 1 CLJ 645 which held that the court has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustice in limited circumstances. I do not think the case before me merits the consideration of the decision of the Federal Court. If there is any injustice at all, the appellants brought it upon themselves for failing to comply with the rules of practice. In any case even to the very end the appellants never applied to extend time nor asked for leave. The defect of the appellants could not be cured by applying the decision of the Federal Court because when the appellants had a way to fall back to and failed and/or refused to take advantage of that step that would have helped cure the defect, the appellants cannot seek the aid of the court again by claiming that an injustice had been done to them and seeking the aid of the discretionary powers vested in the judge. Any subsequent interference by this court will certainly cause injustice to the respondent.

I, therefore, had no alternative but to dismiss the appeal with costs.